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FILED
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5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

6 **IN AND FOR THE COUNTY OF YAVAPAI**

7 **STATE OF ARIZONA,**

8 Plaintiff,

9 vs.

10 **STEVEN CARROLL DEMOCKER,**

11 Defendant.

CAUSE NO. P1300CR201001325

**STATE'S RESPONSE TO
DEFENDANT'S OBJECTION TO
NOTICE OF CHANGE OF JUDGE**

Assigned to Hon. David L. Mackey

12
13 The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and
14 her deputy undersigned respectfully submits its response to the Defendant's Objection to Notice of
15 Change of Judge. The State's response is supported by the following Memorandum of Points and
16 Authority.

17 **Memorandum of Points and Authorities**

18 **Procedural History**

19
20 On October 23, 2008 the Defendant was arrested and on October 31, 2008 the Defendant
21 was indicted on his first case, P1300CR20081339 for First Degree Murder and Burglary
22 (homicide case). The case proceeded to trial and on November 12, 2010 a mistrial was declared.

23 On September 29, 2010 the Defendant was indicted on a second case,
24 V1300CR201080461, for Fraud Schemes involving an "anonymous email" (Fraud Schemes).
25 The case was dismissed on December 16, 2010 without prejudice.
26

1 On December 10, 2010 the Defendant was indicted on a third case, P1300CR201001325
2 (Consolidated case). The newly indicted consolidated case encompasses all of the charges that are
3 inextricably interrelated with the homicide case. The consolidated case also has a new charge of
4 fraud schemes involving the Hartford Life insurance policies on victim Carol Kennedy's life.

5 On December 16, 2010 the State filed its Notice of Change of Judge (Notice) pursuant to
6 Rule 10.2 ARCP. On December 17, 2010 Judge Darrow sent the consolidated case to the
7 Presiding Judge for reassignment. Then Presiding Judge Brutinel, assigned the consolidated case
8 to Division 5, Judge William Kiger (now Judge Celé Hancock)¹ on December 28, 2010. On
9 December 30, 2010 the Defendant filed his Objection to the Notice of Change of Judge. On
10 January 4, 2011 Judge Hancock recused herself and returned the case to Presiding Judge David
11 Mackey for reassignment.
12

13 On January 13, 2011 the State filed a motion for clarification of an order by Judge
14 Mackey dated January 11, 2011. Judge Mackey's order reassigned the Notice of Change of Judge
15 and Defendant's Objection to Notice of Change of Judge to Judge Warren Darrow. He also
16 vacated the Order reassigning the matter to Court Administration for reassignment. The State's
17 motion for clarification questions the legality of Judge Mackey's order sending the case back to
18 the noticed judge.
19

20 Due to the status of the Notice, Defendant's objection and the orders from Presiding Judge
21 Mackey, the state is unsure which Judge will be deciding these issues. The State believes that
22 Judge Darrow is precluded from hearing the issues pursuant to Rule 10.4(a) ARCP.
23

24 Beginning early on in the homicide case, and at the direction of the court, the parties
25 regularly served pleadings via email. The email notice sent to defense counsel on December 16,
26

¹ Judge Kiger retired on December 31, 2010. Judge Hancock took over Division 5 on January 3, 2011.

1 2010 was a continuation of this practice. When an email sent by the county attorney's office is
2 undeliverable a message is received by the sender stating that the email is undeliverable. No such
3 message of undeliverability was ever received in regard to the Notice of Change of Judge
4 emailed to attorneys Williams and Parzych.

5 The State informed attorney William's office, through his paralegal Misty, that all
6 motions would be delivered by email, as had been the practice with previous defense counsel and
7 the court. Misty indicated that practice was acceptable. Craig Williams has also recently indicated
8 that practice is acceptable and also acknowledged the receipt of the email Notice of Change of
9 Judge.

10 **Legal Argument:**

11 **I. The State filed a valid and timely Notice of Judge in accordance with ARCP**
12 **10.2**

13 In accordance with Rule 10.2 ARCP the law is clear that the State had the right to file
14 a Notice of Change of Judge. Peremptory changes of judge have been a mainstay of Arizona
15 jurisprudence since the early part of this century. *See Gee Long v. State*, 33 Ariz. 420, 265 P. 622
16 (1928); *Shew Chin v. State*, 33 Ariz. 419, 265 P. 621 (1928). The State's previous 10.2 motion in
17 the original homicide case has no bearing on the present consolidated matter. Under Rule 10.2,
18 each side is entitled to request a change of judge. In *Godoy v. Hantman*, 205 Ariz. 104, 106, 67
19 P.3d 700, 702 (2003) the court stated "New indictment begins a separate matter, and thus, the
20 right to a peremptory change of judge applies as if no prior criminal action had been filed." It is
21 clear that once the State indicted the Defendant on December 10, 2010, Rule 10.2 was applicable
22 to the new indictment, *Godoy supra*. At the same time, the clock started to run for the State to
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24
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26

1 timely file its Notice of Change of Judge. A party has 10 days to file its Notice when it is
2 informed of the Judge who has been assigned to the matter. The State had until December 20,
3 2010 to file its Notice of Change of Judge. The notice was timely filed on December 16, 2010. A
4 court cannot disregard a timely notice of a change of judge. *State v. Shahan*, 17 Ariz.App. 148,
5 149,495 P.2d 1355, 1356 (1972) (“A litigant has a peremptory right of disqualification of a judge
6 and if filed timely the court is in error to deny the transfer to another judge.”).

7
8 The argument that the State has participated in substantive hearings is without merit. An
9 administrative hearing was held on December 13, 2010 in the newly indicted consolidated case
10 whereby the court entered the Defendant’s not guilty plea, assigned defense counsel, waived time and
11 confirmed release conditions. These actions are clearly administrative and do not constitute a
12 “substantive hearing” on the merits. Participating in proceedings in a previous case does not waive a
13 party’s right to a change of judge in a new action.” *Godoy* at 106, 67 P.3d at 700, 702.

14
15 There is a similarity between the present case and the *Godoy* case contrary to Defendant’s
16 assertion that they are dissimilar. In *Godoy*, the Court considered whether the present case was
17 containing exactly the same charges as the earlier indictment was the result of a new indictment
18 or a continuing earlier indictment. The Court, ruled, “When the new case began, Rule 10.2
19 provided each party a peremptory right to change the judge within the time permitted by the rule.”
20 See *New Mexico v. Ware*, 115, N.M. 339, 850 P.2d 1042, 1045 (CtApp.1993). Clearly, this fact
21 pattern is similar to the present case and, similar to *Godoy*, the State’s Notice of Change of Judge
22 was timely filed in accordance with Rule 10.2.

23
24 The Defendant suggests that because the State filed a Rule 10.1 Notice of Judge for Cause
25 on the homicide case in regard to Judge Lindberg, that the State should be precluded from filing a
26 Rule 10.2 Notice of Change of Judge on the newly indicted case. Either party in a criminal

1 matter may file a Rule 10.1 "after discovery that grounds exist for change of judge"...making
2 "allegations of interest or prejudice which prevent a fair and impartial hearing or trial..." Rule
3 10.1 is specific to removing a Judge for cause for which the petitioner must allege specifically the
4 grounds for the change and must present evidence at a hearing presided over by the presiding
5 judge to determine if the case should remain with the trial judge or be reassigned to a new judge.
6 Judge Darrow denied the State's 10.1 Notice of Change of Judge pertaining to Judge Lindberg
7 on the basis that it was moot because Judge Lindbergh was no longer assigned to the case. The
8 State's 10.1 Notice of Change of Judge was filed in the original homicide case and has no bearing
9 whatsoever on the State's 10.2 Notice of Change of Judge in the newly indicted case.

11 The Defendant attempts to draw a parallel between the newly indicted consolidated case
12 and *State v. Poland*, 144 Ariz. 388, 395, 698 P.2d 183, 190 (1985). There is a distinct difference
13 between the two cases. In *Poland*, the parties were involved in a substantive hearing prior to the
14 filing of the Notice of Change of Judge in the case in which the Notice of Change of Judge was
15 filed. Under Rule 10.4(a) the parties lost their right to file a Notice of Change of Judge.

17 Rule 10.4(a) Waiver

18 A party loses the right under Rule 10.2 to a change of judge when
19 the party participates before that judge in any contested matter in
20 the case, an omnibus hearing, any pretrial hearing, a proceeding
21 under Rule 17, or the commencement of trial. A party loses the
22 right under Rules 10.1 and 10.3 when the party allows a
proceeding to commence or continue without objection after
learning of the cause for challenge.

23 In *Poland*, the parties participated in a hearing to determine if the case should be
24 dismissed with or without prejudice. "If party participates in hearing which involves contested
25 issue of law or fact, the right to peremptory challenge of judge is waived." *Id* at 395,190.
26

1 There have been no substantive motions that have been heard or that are pending in the
2 newly indicted consolidated case. Nothing substantive was ruled upon by Judge Darrow in the
3 newly indicted consolidated case on or after December 13, 2010.

4 **II. There are no substantive issues pending in the newly indicted consolidated case**

5 In his motion Defendant states that substantive issues from the November 23, 2010
6 hearing were addressed at the hearing on December 13, 2010 in the homicide case, the fraud
7 schemes case and the consolidated case. This is false and misleading.

8
9 The Defendant is attempting to mix the two older cases with the newer case. This is
10 especially obvious when Defendant blurs the distinction between the hearing on November 23,
11 2010 and the hearing on December 13, 2010. The hearing on November 23, 2010 was devoted
12 solely to the original homicide case under P1300CR20081339. There was no new indictment
13 consolidating all charges until December 10, 2010. The hearing on December 13, 2010 was
14 administrative in nature to commence the newly indicted case. On December 21, 2010 the Court
15 issued an Order Nunc Pro Tunc vacating procedure for transferring pending motions. In the Order
16 the Courts directs the parties to contact the newly assigned Judge regarding procedures for the
17 refiling of motions in the new cause number. (See attached Minute Entry). Neither motion is
18 pending in the new case².

19
20 The only substantive ruling made by Judge Darrow, after the new indictment of the
21 consolidated case, was in the original homicide case when he dismissed that case without
22 prejudice on December 17, 2010.
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² The State searched OnBase on January 13, 2011 and did not find these motions.

1 **III. The State presented evidence to the Grand Jury of crimes that are inextricably**
2 **interrelated**

3 The State presented the entire scenario of the homicide case and the fraudulent schemes
4 case along with the new evidence of the life insurance scam. All of these events are inextricably
5 interrelated and, as such, required a consolidated presentation to the grand jury. The fraud scheme
6 charges involving the Hartford Life Insurance policies on the victim Carol Kennedy's life began
7 prior to the homicide and continued past the arrest and incarceration of the Defendant. The fraud
8 schemes surrounding the voice in the vent and the anonymous email took place during
9 Defendant's incarceration and were part and parcel of Defendant's manufactured third party
10 culpability defense. Obviously, all of these crimes are inextricably interrelated with the homicide
11 of Carol Kennedy. The life insurance policies were part of the pecuniary gain and financial
12 motive for the homicide. The voice in the vent and anonymous email were part of the
13 manufactured defense for the homicide. The Yavapai County Grand Jury found probable cause
14 for the indictment of these offenses when they were presented with the complete story concerning
15 the homicide of Carol Kennedy by the Defendant. This is not improper joinder. Rather it is a
16 complete presentation of all of the facts surrounding the homicide of Carol Kennedy, committed
17 by the Defendant, and the fraud schemes, committed by the Defendant, which arose out of that
18 homicide either by way of motive or as a defense.
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21

22 **IV. Response to Grand Jury Transcript Argument**

23 The presentation to the grand jury was necessitated as a result of the new crimes of fraud
24 schemes involving the Hartford Life Insurance policies, the voice in the vent and the anonymous
25 email and the fact that they all arose from and were inextricably interrelated with the homicide of
26 Carol Kennedy committed by Defendant.

1 **Conclusion:**

2 On December 13, 2010 the court held an administrative hearing on the consolidated case.
3 There were two pending matters in the homicide and fraud schemes cases that were to be
4 transferred to the consolidated case. On December 21, 2010 the Court issued an order Nunc Pro
5 Tunc vacating the order to transfer the motions. The State filed its Notice on December 16,
6 2010, approximately six days after the arraignment and four days before the last day to file a Rule
7 10.2 Notice of Change of Judge. At the time the indictment was handed down by the grand jury,
8 and on the day the State filed its Notice of Judge, there were no substantive issues pending before
9 the court.
10

11 Under Rule 10.2 the State timely filed its Notice of Change of Judge. Therefore, the
12 Defendant's Objection to State's Notice of Change of Judge should be dismissed.
13

14 **RESPECTFULLY SUBMITTED** this ^{ym} 14 day of January, 2011.
15

16
17 **Sheila Sullivan Polk**
18 **YAVAPAI COUNTY ATTORNEY**

19
20 By: 
21 **Joseph C. Butner**
22 Deputy County Attorney
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26

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1 **COPY** of the foregoing Emailed this
2 14th day of January, 2011, to:

3 Honorable David L. Mackey
4 Division 1
5 Yavapai County Superior Court
6 (via email)

7 Honorable Warren R. Darrow
8 Division PTB
9 Yavapai County Superior Court
10 (Courtesy copy via email)

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By: 

FILED
12:42 O'Clock M
DEC 21 2010
JEANNE HICKS, Clerk
BY Rita Storms
Deputy

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI**

FOR DIVISION 6

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: P1300CR20081339

Date: December 21, 2010

TITLE:

COUNSEL:

STATE OF ARIZONA

Jeffrey Paupore, Esq.
Joseph C. Butner III, Esq.
Deputy Yavapai County Attorneys

(Plaintiff)

(For Plaintiff)

vs.

STEVEN CARROLL DEMOCKER

Craig K. Williams, Esq.
DeRienzo & Williams

Greg Parzych, Esq.
2340 W. Ray Road, Suite One
Chandler, Arizona 85224

(Defendant)

(For Defendant)

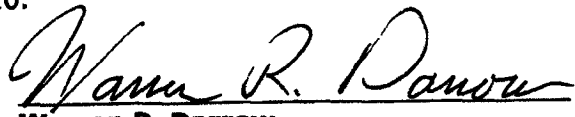
**ORDER NUNC PRO TUNC VACATING PROCEDURE
FOR TRANSFERRING PENDING MOTIONS**

The Court being informed by the Clerk of technical considerations in transferring pending motions and requests to the new cause number and the Court being mindful of the limitations of this Court's authority under Rules 10.2 and 10.6 of the Arizona Rules of Criminal Procedure,

IT IS HEREBY ORDERED, *nunc pro tunc*, vacating the portion of the Court's order filed December 17, 2010, regarding transfer of pending motions in the former cause numbers. The parties are directed to contact the Clerk and, when determined, the newly-assigned judge regarding procedures for the refiling of motions in the new cause number.

The order of December 17, 2010, is otherwise confirmed.

DATED this 21st day of December, 2010.


Warren R. Darrow
Superior Court Judge

cc: Victim Services Division
Division 6